

Preliminary Draft
of
Proposed Amendments
to the
Federal Rules
of
Practice and Procedure

SUBMITTED FOR PUBLIC COMMENT

Comments Due by February 15, 2001

Administrative Office of the U. S. Courts

Leonidas Ralph Mecham, Director

**A SUMMARY FOR BENCH AND BAR
(AUGUST 2000)**

REQUEST FOR COMMENT ON PROPOSED
AMENDMENTS TO THE FEDERAL RULES
OF PRACTICE AND PROCEDURE

The Judicial Conference's Advisory Committees on Appellate Rules, Bankruptcy Rules, Civil Rules, and Criminal Rules have proposed amendments to various rules and are seeking public comment on the proposed changes.

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) **has not approved these proposals** but submits them for public comment. The proposals have not been presented to the Judicial Conference or the Supreme Court.

The full text of the proposed rules amendments and explanatory Committee Notes are set out in the *Request for Comment* pamphlets, which are posted on the Internet at <<http://www.uscourts.gov/rules/>> and are available on request from the Secretary to the Rules Committee. A proposed comprehensive "style" revision of the Federal Rules of Criminal Procedure is separately published. The synopses on the following pages highlight the major aspects of the proposed Appellate, Bankruptcy, Civil, and Criminal Rule amendments. The synopses are intended to stimulate greater public comment and participation in the rulemaking process. The synopses are drawn largely from the committees' reports, which are also set out in the *Request for Comment* pamphlets.

The rules committees welcome all comments, whether favorable, adverse, or otherwise. All comments from the public on these proposals will be considered individually and carefully by the respective rules committees, which consist of experienced trial and appellate lawyers, scholars, and judges.

Written comments or comments sent electronically must be received by the Secretary to the Rules Committee **no later than February 15, 2001**. Comments may be sent electronically via the Internet at <<http://www.uscourts.gov/rules/>>.

An opportunity is also provided to the public to appear at scheduled public hearings to testify regarding the proposals. Requests to appear at a public hearing must be received by the Secretary to the Rules Committee no later than 30 days prior to the scheduled date for the public hearing. Information on the Secretary's mailing address and the dates and places of the scheduled public hearings is set out at the end of this brochure.

Under the proposed schedule, the rule amendments would become effective on December 1, 2002, or later if — following the public comment period — they are in turn approved, with or without revision, by the relevant advisory committee, the Standing Committee, the Judicial Conference, and the Supreme Court, and if they are not altered by Congress.

I. Proposed Amendments to the Federal Rules of Appellate Procedure:

Rule 1(b) (Rules Do Not Affect Jurisdiction) — which provides that the rules of appellate procedure "do not extend or limit the jurisdiction of the courts of appeals" — is abrogated, as it has been rendered obsolete by recent statutory changes.

Rule 4(a)(1)(C) (Time for Filing a Notice of Appeal) is added to provide that an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases).

Rule 4(a)(5)(A)(ii) (Motion for Extension of Time) is amended to provide that a district court may extend the time to file a notice of appeal upon timely motion of a party if the party shows either excusable neglect or good cause, regardless of whether the timely motion is filed within the unextended appeal time or within the next 30 days.

Rule 4(a)(7) (Entry Defined) is amended in conjunction with concurrently proposed amendments to Fed. R. Civ. P. 58 to address several complicated questions that arise when a party seeks to appeal a judgment or order that is required to be set forth on a separate document but is not.

Rule 4(b)(5) (Jurisdiction) is amended to provide that the filing of a motion to correct a sentence under Fed. R. Crim. P. 35(c) does not toll the time to appeal the judgment of conviction.

Rule 5(c) (Form of Papers; Number of Copies) is amended to impose a 20-page limit on petitions for permission to appeal, cross-petitions for permission to appeal, and answers to petitions or cross-petitions for permission to appeal.

Rule 15(f) (Petition or Application Filed Before Agency Action Becomes Final) is added to provide that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing or similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition.

Rule 21(d) (Form of Papers; Number of Copies) is amended to impose a 20-page limit on petitions for extraordinary relief (such as mandamus) and answers to those petitions.

Rule 24(a) (Leave to Proceed in Forma Pauperis) — which governs the ability of parties to proceed in forma pauperis on appeal — is amended to eliminate apparent conflicts with the Prison Litigation Reform Act of 1995.

Rules 25(c), 25(d), 26(c), 36(b), and 45(c) are amended to authorize the use of electronic service upon consenting parties and to provide various rules governing such service.

Rule 26(a)(2) (Computing Time) is amended to provide that, in computing deadlines under FRAP, intermediate Saturdays, Sundays, and legal holidays should be excluded when computing deadlines under 11 days, as is currently done when computing deadlines under the rules of civil and criminal procedure. Several deadlines are adjusted in light of the more generous method of calculating time. *See* Rule 27(a)(3)(A) (time within which a party must file a response to a motion changed from 10 days to 7 days); Rule 27(a)(4) (time within which a party must file a reply to a response to a motion changed from 7 days to 5 days); and Rule 41(b) (time within which the mandate of a court must issue changed from 7 days to 7 *calendar* days).

Rule 26.1 (Disclosure Statement) is amended to require a nongovernmental corporate party not only to file a disclosure statement in which it identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock (as a nongovernmental corporate party is required to do under existing Rule 26.1), but also to file a statement indicating that there are no such corporations if that is true, to include in any disclosure statement any additional information that may be required by the Judicial Conference of the United States, and to supplement any disclosure statement when circumstances warrant. Rule 26.1 is also amended to require parties other than nongovernmental corporate parties to file a disclosure statement in which they disclose any information that may be required by the Judicial Conference and to supplement any disclosure statement when circumstances warrant.

Rules 27(d)(1)(B) (Cover) and 32(c)(2)(A) (Other Papers) are amended to provide that when a cover is used on a paper voluntarily, the cover must be white. Rule 32(a)(2) is amended to provide that the cover on a supplemental brief must be tan.

Rule 28(j) (Citation of Supplemental Authorities) is amended to eliminate the prohibition on “argument” in letters that draw the court’s attention to supplemental authorities and to impose a 250-word limit on such letters.

Rule 31(b) (Number of Copies) is amended to clarify that briefs must be served on all parties, including those not represented by counsel.

Rule 32(d) (Signature) is amended to provide that every brief, motion, or other paper filed with the court must be signed by the attorney or unrepresented party who files it.

Rule 44(b) (Constitutional Challenge to State Statute) is added to require a party to give written notice to the clerk if the party questions the constitutionality of a state statute in a proceeding in which the state is not a party, and to require the clerk to notify the state's attorney general of that challenge.

Form 6 is added as a suggested form of a certificate of compliance with the type-volume limitation of Rule 32(a)(7)(B), and Rule 32(a)(7)(C) is amended to provide that the filing of new Form 6 must be regarded as sufficient.

II. Proposed Amendments to the Federal Rules of Bankruptcy Procedure:

Rule 1004 (Involuntary Petition Against a Partnership) would be amended to clarify that it applies only to involuntary cases against partnerships and to set out the procedures for serving a summons and a copy of the involuntary petition on the partners who are not petitioners.

Proposed new Rule 1004.1 (Petition for an Infant or Incompetent Person) establishes procedures for a case commenced on behalf of an infant or an incompetent person.

Rule 2004 (Examination) would be amended to compel a witness to attend an examination of an entity in accordance with procedures in Civil Rule 45 governing a subpoena, whether the examination is conducted within or outside the district in which the case is pending. Under the amendments, an attorney authorized to practice either in a court in which the case is pending or in a court for the district in which the examination will be held may issue and sign the subpoena.

Under the proposed amendments to Rule 2014 (Employment of a Professional Person), a professional seeking to render services in a bankruptcy case must disclose to the court certain information substantiating the person's "disinterestedness" in the case. The amended rule also sets out service requirements for the application of an order approving employment of a professional person.

Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case) would be amended to clarify the trustee's or debtor in possession's duty to report disbursements in accordance with recent statutory changes.

Under the proposed amendment of Rule 4004 (Grant or Denial of Discharge), the filing of a motion to dismiss under § 707 of the Bankruptcy Code would postpone the entry of discharge in a chapter 7 case.

Rule 9014 (Contested Matters) governs contested matters. It would be amended to permit service by electronic means, clarify that an evidentiary hearing must be held if a disputed, unresolved material issue of fact exists, and establish procedures notifying attorneys at an early date of a hearing at which witnesses are to appear.

Rule 9027 (Removal) would be amended to clarify the time limits for filing a notice of removal of a claim or cause of action filed after the commencement of a bankruptcy case, whether the bankruptcy case is still pending or has been suspended, dismissed, or closed.

Finally, Official Form 1 would be revised to require the debtor to disclose ownership or possession of property that poses a threat of harm to the public health or safety.

III. Proposed Amendments to the Federal Rules of Civil Procedure:

Proposed new Rule 7.1 (Disclosure Statement) would require a nongovernmental corporate party to disclose any parent corporation and any publicly held corporation that owns 10% of its

stock, or state that no such corporation exists. Under the rule, a party is also required to disclose any information that may be required by the Judicial Conference and supplement the disclosure when circumstances change. The proposed new rule is similar to proposed changes to the appellate and criminal rules. But it adds a requirement that the clerk deliver the disclosure statement to each judge acting in the proceeding to account for the prospect that a civil proceeding is more likely than other proceedings to come before more than one judge.

The proposed amendment to Rule 54 (Judgments; Costs) reflects changes in Rule 58 (Entry of Judgment). Rule 58 would be amended to address the problems that arise when, because a court has failed to honor the requirement that a judgment be entered on a separate document, appeal time never begins to run under the appellate rules. In conjunction with proposed changes to Appellate Rule 4(a)(7), the amended rules cure this problem by providing that when a separate document is required, judgment is entered on either of two events, whichever is earlier: when the judgment is entered on the civil docket and set forth on a separate document, or when 60 days have run from entry of the judgment on the civil docket. Under the proposed amendments to Rules 54 and 58, moreover, orders disposing of certain post-judgment motions would no longer have to be entered on a separate document.

Rule 81(a)(2) (Applicability in General) would be amended to conform the time limits governing a writ of habeas corpus with the rules governing § 2254 and § 2255 proceedings.

IV. Proposed Amendments to the Federal Rules of Criminal Procedure:

A. Proposed Style Revision

The Judicial Conference's Advisory Committee on Federal Rules of Criminal Procedure has completed its style revision of the criminal rules in accordance with uniform drafting guidelines. The restyling of the criminal rules is the second in a series of comprehensive revisions to simplify, clarify, and make more uniform all the federal procedural rules.

The proposed changes are intended to be primarily stylistic only. However, the advisory committee's extensive style review revealed ambiguities and inconsistencies in the rules that required correction. The committee has attempted to identify any revision that may cause a change in practice and explained them in the Committee Notes.

B. Proposed Substantive Amendments

The proposed amendments to Rules 5 (Initial Appearance), 10 (Arraignment), and 43 (Defendant's Presence) would authorize a court, upon the defendant's consent, to permit videoconferencing of an initial appearance proceeding and an arraignment. Comments on alternative versions that would not require the defendant's consent are also solicited.

Rule 5.1 (Preliminary Hearing in a Felony Case) would be amended to authorize a United States magistrate judge to grant a continuance for a preliminary hearing.

Under the proposed amendments to Rule 12.2 (Notice of Insanity Defense; Mental Examination), the procedures governing the ordering, consideration, and disclosure of expert testimony on mental condition are clarified.

New Rule 12.4 (Disclosure Statement) closely tracks the financial disclosure provisions proposed in similar amendments to the appellate and civil rules. It also would require the government to disclose the identity of any organizational victim, which could affect a judge's recusal decision if restitution is ordered.

The proposed amendment of Rule 26 (Taking Testimony) would authorize a court to permit contemporaneous, video presentation in open court of testimony from a witness who is at a different location.

Rule 30 (Jury Instructions) would be amended to clarify the timing of a request for jury instructions.

Rule 32 (Sentencing and Judgment) would be amended to clarify the requirement to rule on unresolved, controverted matters in a presentence report.

The proposed amendment of Rule 35 (Correcting or Reducing a Sentence) would clarify circumstances when a sentence can be reduced to account for the defendant's substantial assistance in providing information helpful to the government in prosecuting another person when the information was known but not fully appreciated nor acted on within the prescribed time.

Rule 41 (Search and Seizure) would be amended to provide procedures, which had been authorized by two courts of appeals, for issuing a warrant for covert observations.

C. Proposed Amendments Governing Habeas Corpus Rules

The amendments to Rules 2, 3, 6, 8, 9, and 10 governing § 2254 and Rules 2, 3, 6, 8, 9, and 10 governing § 2255 proceedings are proposed to conform the rules with the Antiterrorism and Effective Death Penalty Act and recent amendments of the criminal rules, including consistent references to "magistrate judge." Among other changes, the proposed amendments account for a statutory revision limiting the ability of petitioners and movants to obtain habeas corpus relief on successive motions.

Public hearings are scheduled to be held on the amendments to

- Appellate Rules in San Francisco, California, on January 29, 2001;
- Bankruptcy Rules in Washington, D.C., on January 26, 2001;
- Civil Rules in San Francisco, California, on January 29, 2001; and
- Criminal Rules in New Orleans, Louisiana, on January 24, 2001, in San Francisco, California, on January 29, 2001, and in Washington, D.C., on February 12, 2001.

Those wishing to testify should contact the Secretary at the address below in writing at least 30 days before the hearing.

All written comments on the proposed rule amendments should be mailed to:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Comments on the proposed rule amendments may also be sent electronically via the Internet at <<http://www.uscourts.gov/rules/>>.

In accordance with established procedures all comments submitted on the proposed amendments are available to public inspection.

The text of the proposed rule amendments and the accompanying Committee Notes can be found at the United States Federal Courts' Home Page at <<http://www.uscourts.gov/rules/>> on the Internet. For further information, copies of this brochure, the *Request for Comment* pamphlets, and other materials, contact:

John K. Rabiej, Chief
Rules Committee Support Office

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